
Counter-Terrorism Laws and the Media: National Security and the Control of Information

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Liberal democracies presently struggle with the need to balance the demands of national security with traditional commitments to media freedom. The enactment of counter-terrorism laws since 2001 has seen the state expand its ability to control information. This article examines that expansion, drawing on interviews with journalists and lawyers to consider the potential and actual effects of the laws. It argues that the strongest, most direct effects relate to the reporting of court proceedings. The laws have not yet, it seems, had a chilling effect, but they have brought about apprehension and caution. Even if not causally affecting the flow of information, the laws remain an important part of the context in which information is controlled or limited by other means. When viewed side by side, the combination of these effects suggests that the degree of control over information does not necessarily correspond with the presence or degree of legal regulation.

Liberal democracies are faced with a task that is presently very troubling: they must balance traditional commitments to media freedom with the secrecy and closure that is often demanded by national security needs. On the one hand, there must be access to information and an ability to publish without fear of prosecution. At its best, the media plays the role of watchdog—the fourth estate that holds all branches of government to account. On the other hand, the state and its citizens have a legitimate interest in national security. That interest will at times demand that information is not made available to the media, publication will be restricted or prevented, and the criminal law will be used to enforce these limits on media freedom.

In general terms, two main legal strategies are employed to limit media freedom. First, there are laws designed to prevent the media obtaining information. Secondly, there are laws aimed at preventing publication so that, in the event information is obtained, the media cannot disseminate that information. As well as creating direct obstacles, the fact that there will be penalties for breaching the laws may have a chilling effect on the media. That is, media organisations may engage in a form of self-censorship by erring on the side of caution, especially when making decisions about what should and should not be published. Together, though in different ways, these strategies limit the extent to which the public finds out about the activities of the state or of its individual or corporate citizens.

Neither of the legal strategies is new but since 2001 they can be found more readily in Australian counter-terrorism laws. Media organisations have argued that these laws restrict the ability of the media to investigate and report on matters of public interest.¹ The Australian Press Council has expressed concern that the laws shield governments from public scrutiny.² Similar arguments can be found in the *Report of the Independent Audit of the State of Free Speech in Australia* which was commissioned by a coalition of Australian media organisations under the campaign umbrella of 'Australia's Right to Know'.³ In the scholarly literature there is preliminary analysis that supports those claims.⁴

Against that background, this article explores how the tension between media freedom and national security is presently balanced. It considers especially how the new laws directly affect the media in so far as the state prevents publication or access to information and contrasts this with the ways that the laws are relevant to the control of information even in the absence of formal prohibitions or restrictions on publication.

Three different dimensions of control will be examined, each with a decreasingly significant role for the law. Part one considers the most overt controls which occur in the judicial process and under which there are express restrictions on access to information and publication. Part two turns to less easily-identified limitations and restrictions that result from self-censorship. Part three looks at how control is exercised at the very periphery of the legal framework where legislation does not always have a direct effect but forms part of the context in which information is controlled. Each of these, it will be argued, is a matter of significant concern but, importantly, it will be suggested that the degree of control over information does not necessarily correspond with the presence or degree of legal regulation.

The analysis draws substantially on a series of semi-structured interviews with journalists and lawyers which sought to ascertain and analyse the ways the media is actually being affected by the laws, considering this especially

¹ Media, Entertainment and Arts Alliance [MEAA], Submission to the Senate Legal and Constitutional Committee, Inquiry into the Provisions of the Anti-Terrorism Bill (No. 2) 2005, Submission 198 (November 2005); Australian Broadcasting Corporation [ABC], Submission to the Senate Legal and Constitutional Committee, Inquiry into the Provisions of the Anti-Terrorism Bill (No. 2) 2005, Submission 196 (11 November 2005).

² Jack Herman (ed.), *State of the News Print Media in Australia 2007: Supplement to the 2006 Report* (Sydney: Australian Press Council, 2007), pp. 59-64.

³ Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia* (Sydney: Australia's Right to Know, 2007) esp. pp. 155-9, 162-4.

⁴ Chris Nash, 'Freedom of the Press in the New Australian Security State', *University of New South Wales Law Journal*, vol. 28, no. 2 (2005), pp. 900-8.

in light of the potential effect of the laws.⁵ Participants were identified through the literature, the news media, and formal and informal interviews and conversations with journalists, lawyers and academics in the field. The interviewees were ten journalists who were regularly reporting on the issues and nine lawyers. These were media lawyers (some in-house counsel and some from firms) who provide advice and make judgments about what can or cannot be published, and criminal lawyers who had been involved in proceedings where there may be attempts to regulate the media's access to, and reporting of, security-related information. The interviews were conducted in July and August 2007. It was around that time that Dr Mohamed Haneef was arrested in Queensland and charged with terrorism offences in circumstances where access to and the release of information was highly contentious.⁶ As such, many of the interviewees had given a deal of thought to the issues that were discussed in the interviews, and the Haneef matter was referred to regularly.

These interviews canvassed the ways that the laws had restrictive effects, though neither the interviewer nor interviewees assumed that an unrestricted media was either desirable or practical. On the contrary, both journalists and lawyers accepted that secrecy is sometimes required and that means that information may need to be restricted. In addition, there was a clearly conveyed view that the media would not work against security authorities. As a lawyer put it, if a journalist thought a terrorist act was likely then "the first [priority] would be human safety" and they would go to the police "within two seconds"; "journalists aren't that intent on good stories that they would endanger [sic] an actual act of terrorism to get a good story".⁷

The research focused on major media outlets because these organisations have the resources and expertise needed to resist and challenge the

⁵ The most extensive report of this research can be found in Lawrence McNamara, 'Closure, Caution and the Question of Chilling: How Have Australian Counter-Terrorism Laws Affected the Media?', *Media & Arts Law Review*, vol. 14, no. 1 (2009), pp. 1-30.

⁶ Dr Haneef, an Indian national, was arrested on suspicion that he was guilty of supporting terrorism through a connection to the attack at Glasgow International Airport on 1 July 2007. He was taken into custody for questioning on 2 July and held for twelve days before being charged. He was granted bail two days later but remained in detention following the Minister's immediate cancellation of his visa amid much talk of information that could not be released to the public but which implied that Haneef was meaningfully connected to terrorism. The criminal charges were withdrawn on 27 July 2007. The visa cancellation was overturned by the courts on 21 December 2007. On 13 March 2008 the Labor government elected in November 2007 established an inquiry into the Haneef case: <www.haneefcaseinquiry.gov.au>. On 29 August 2008 the Australian Federal Police (AFP) formally announced they were no longer investigating Haneef and the Australian Security Intelligence Organisation (ASIO) had earlier indicated they did not consider Haneef to have terrorism connections. The Clarke Inquiry reported to the government on 21 November 2008: 'Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef', <<http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Report>> [Accessed 10 May 2009]. The government released the report to the public two days before Christmas on 23 December 2008.

⁷ All comments are taken from the interviews unless otherwise stated.

limitations imposed by the law. If the effects are strong on major organisations then it might be that smaller bodies face even greater obstacles or greater difficulty overcoming the same obstacles.⁸

Commentators and columnists were not interviewed. The principal focus is on the media's ability to report on matters involving prosecutions for terrorism and investigative reporting on matters relating to terrorism. The media's ability to present opinion and comment on terrorism, terrorist groups or government policy are clearly very important aspects of the public discussion of national security. These matters have attracted significant concern and criticism, especially with regard to the extent to which sedition laws have been revived and revised in a way that prevents the expression of opinion.⁹ However, this piece is principally concerned with the information-based aspects of reporting on national security matters.

Open Justice and Closed Courts

The media do not have special access to courts. Their access and ability to report on matters are derived from the principles of open justice. 'Open justice' is a central—indeed, defining—feature of judicial proceedings in Australia and other common law countries. It means that hearings will ordinarily be accessible to members of the public and that information disclosed in them can be reported to the public at large. The rationales for open justice reside in the benefits of public scrutiny of the quality of justice being administered in the courts with exposure aiming to ensure that judicial power is exercised impartially.¹⁰ However, open justice does not mean that all aspects of all proceedings can be reported at any time. A range of limits applies, essentially on the basis that there are other factors to be taken into account in the administration of justice and, on occasion, the administration of justice requires some limits on openness. These limits may restrict access to the court, or they may allow access but will restrict publication.

⁸ It would, however, be of great interest to explore the experience of smaller organisations because they may feel different effects, especially where there is a sense that their communities are being targeted by particular laws, by sections of the wider community, and perhaps by the major media.

⁹ The sedition laws and associated restrictions on expression in the *Criminal Code* ss 80.2ff were enacted by the *Anti-Terrorism Act (No 2) 2005* (Cth), Schedule 7. The Australian Law Reform Commission reviewed these and made recommendations for change: *Fighting Words: A Review of Seditious Laws in Australia, Report 104* (Sydney: ALRC, 2006). The Howard government did not act on the recommendations. The Rudd government has recently indicated that it will implement almost all the recommendations: 'Australian Government Response to ALRC Review of Seditious Laws in Australia: December 2008', <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponseToALRCReviewofSeditiousLawsinAustralia-December2008> [Accessed 19 February 2009].

¹⁰ For an excellent, brief outline of the history, rationales and significance of open justice, see Des Butler and Sharon Rodrick, *Australian Media Law*, 3rd edn. (Sydney: Thomson Lawbook Co., 2007), pp. 161-3.

In criminal cases, where access is generally allowed, the laws of *sub judice* contempt will play an important role in determining what can be published, both before and during a trial. When a person is charged with a criminal offence, the media will be able to report the basic facts associated with arrest and charge. However, under *sub judice* contempt laws, the media cannot publish material which may prejudice a trial. In particular, the publication of prior convictions and photographs of the accused are not generally permitted. There is a limited public interest defence under which some prejudice to the administration of justice may be permissible if there is a competing public interest that outweighs that prejudice.¹¹ This enables limited reporting of events and allegations at the time of arrest but is still approached cautiously. Once a matter reaches trial then criminal proceedings are ordinarily open to the public. The media may report cases, including reporting the evidence given in court. They may also be able to access a wide range of documents associated with the case, including indictments, briefs of evidence and witness statements. During a trial, material cannot be published if it was not heard by a jury or if it has been suppressed by order of the court.

In terrorism matters, there may be restrictions on access as well as publication. In these cases the ability to report turns heavily on the openness of court proceedings and media access to information and documents relied upon in those proceedings, especially because security-related information may not be easily discovered outside of proceedings. There are two ways access may be restricted in terrorism cases. The first is through the closure of courts using established powers and these have been relied upon in recent terrorism cases.¹² However, open justice must be considered and Justice Bongiorno in the Victorian Supreme Court recently stated that:

The Court will maintain its vigilance to ensure ['protective orders'] are never unreasonably or unnecessarily applied and of course the press interests can always seek to be heard on any occasion on which [such orders] are sought to be invoked.¹³

The second form of restriction is based on the management of evidence. It is well-established that there may be occasions where evidence will not be admissible if it would prejudice national security.¹⁴ However, the *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) (the

¹¹ *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242; *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15.

¹² *Crimes Act 1914* (Cth) s 85B; *Criminal Code Act 1995* (Cth) s 93.2; *R v Lohdi* [2006] NSWSC 596, affirmed in *R v Lohdi* (2006) 65 NSWLR 573, [2006] NSWCCA 101; *R v Benbrika, Abdul Nacer & Ors (Ruling no 1)* [2007] VSC 141.

¹³ *R v Benbrika, Abdul Nacer & Ors (Ruling no 1)* [2007] VSC 141 at [18]; see also *John Fairfax Publications Pty Ltd v District Court of NSW* [2004] NSWCA 24; *R v Lohdi* (2006) 65 NSWLR 573, [2006] NSWCCA 101, esp. [10], [24], [27]-[28].

¹⁴ *Evidence Act 1995* (Cth) s 130.

NSI Act) establishes a regime that goes much further and, as a consequence, has the potential to place quite comprehensive restrictions on media coverage of terrorism trials.

NATIONAL SECURITY INFORMATION LEGISLATION

The NSI Act was prompted by the Commonwealth's concern that if it relied on established laws to argue that security-sensitive evidence was not admissible, then prosecutions would collapse due to a lack of evidence.¹⁵

The new laws were enacted

to prevent the disclosure of information ... where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.¹⁶

The principal effect is that a trial can proceed where some evidence may not be made available to the accused in its original or complete form.

The procedure requires that any party wishing to rely on evidence that may relate to national security must notify the Attorney-General if that evidence is to be disclosed in the proceedings.¹⁷ If the Attorney-General thinks "there is a real, and not merely a remote, possibility that [a disclosure in evidence] will prejudice national security" then she or he may ask the court to rely on a summarised form of the evidence, or a document with information deleted from it, or evidence of a witness who cannot be called.¹⁸ The court will then hear argument about the extent to which the Attorney-General's view should prevail. Under section 31, the court can decide to prohibit disclosure, permit some disclosure, or permit full disclosure. In making its determination the court must consider (a) the risk of prejudice to national security; (b) whether there would be a "substantial adverse effect on the defendant's right to receive a fair hearing"; and (c) any other matter the court considers relevant. The first of these factors must be given the greatest weight.¹⁹

There is little room for consideration of open justice. Only under the third factor could any such the public interest be taken into account. Moreover, it is difficult for media organisations to make persuasive arguments for openness because, although a judge may allow media submissions on the way evidence should be handled, the media lawyers are not permitted to be in the court while prosecution, defence and government argument is heard.²⁰ As such, it will be almost impossible for the media to address—or even to know—the specific issues in contention.

¹⁵ *R v Lappas & Dowling* [2001] ACTSC 115.

¹⁶ *NSI Act*, s 3.

¹⁷ *NSI Act*, ss 24-25.

¹⁸ *NSI Act* ss 26-27.

¹⁹ *NSI Act* ss 31(8).

²⁰ *NSI Act* s 29(2); *R v Lodhi* [2006] NSWSC 571; *Lohdi v R* [2007] NSWCCA 360.

The NSI Act provides a second way of managing evidence but it is even less satisfactory. Under section 22 the prosecutor and defendant

may agree to an arrangement about any disclosure, in the proceeding, of information that relates to national security or any disclosure, of information in the proceeding, that may affect national security.

An agreement may be far more restrictive than the court would order were disclosure issues contested. The agreement must be approved by the court but even a restrictive agreement could be appealing to a judge because the trial can be managed more effectively if the parties are not resorting to the disruptive, time-consuming section 31 procedures.²¹ It would appear that, where the effect of a section 22 agreement would be that security-related information would not be disclosed, then requirement to notify the Attorney-General (under ss 24-25) would not arise. This could mean that an agreement could also be more restrictive than any limitations which would be sought by the Attorney-General.

By June 2008, the NSI Act had been invoked in proceedings involving twenty-eight defendants, as well as in one application for a control order.²²

THE EXPERIENCE IN TERRORISM TRIALS

While the scope for restrictions is clearly wide, to what extent and in what ways do these restrictions play out in practice? Interviews with journalists and lawyers suggest that are two main ways that the media feels the effects of the laws. First, formal restrictions flow from the different laws, though not necessarily or solely from the NSI legislation. Secondly, informal relationships are increasingly characterised by a lack of openness and this affects the coverage of terrorism trials.

Just as the closure of courts under established powers has been a concern, the NSI laws have also attracted criticism. No interviewees argued that exclusion of the media was necessarily inappropriate or always unjustified. On the contrary, it was accepted that “there will be times when the media or a party even, shouldn’t be able to be involved—it sort of defeats the purpose if they are”. However, there was a clear feeling that applications for court closure were at times used strategically by police to ensure that no media were present at the hearing, thereby forcing the media to rely on police statements.

There was discontent with the NSI procedure which denies the media a place in the process and excludes them from hearings. This was seen as an unjustifiable and inappropriate impediment to the media’s ability to argue

²¹ *R v Khazaal* [2006] NSWSC 1353 at [83]-[95].

²² Attorney-General’s Department, *National Security Information (Civil and Criminal Proceedings) Act 2004 Practitioners’ Guide* (Canberra: Attorney-General’s Department, 2008), p. 5.

effectively in the public interest. Media lawyers argued that while the exclusion of journalists was one thing, there was no good reason to exclude the legal representatives:

We are officers of the court, we understand our obligations to the court, we are bound by them. The chances of us saying, "We understand what the judge has said, we understand what the Act says, but we're just going to do the opposite"—that's just not likely.

The section 22 provision enabling the prosecution and defence to agree on the way evidence will be managed was also criticised. Although there has been some defence support for the media's criticisms of the legislation,²³ media lawyers saw the parties as being "completely preoccupied with the form in which evidence is to be presented to the other side and to the court". For the parties there is good reason to reach an agreement: it helps the prosecution keep information secret and defence lawyers—while they "don't like using it [and] don't want to have to sign up to it"—have

clients who have been in custody for a year or two. [A refusal] to sign up or [a] challenge [to] the legislation means their trial is delayed and they're in custody for even longer.

In the interviews it was usually the legislation—rather than the lawyers—which was the subject of criticism. There was an acceptance that the parties' lawyers had obligations to act in their clients' interests but, still, "trying to put a blanket order over the whole proceedings" was not seen as being in the public interest.

It is difficult to predict how any particular evidence will be dealt with under the determination process or whether courts will approve proposed agreements:

It can be a bit of a lottery [as to how the judge decides]. It can depend on all manner of [their] prior experience and prior relationships with barristers, or with the media.

Experience so far has varied but most interviewees thought judges have not closed courts without seeking good justification, though none were sanguine:

[The judge] I thought was very, very robust in making the government explain why, if they wanted the court shut. [But] what if it was someone who hated the media and didn't give a toss about openness or accountability? ... Personality becomes a very big factor.

The media experience in terrorism trials is affected not only by the formal operation of the laws but also by journalists' informal relationships with lawyers and court staff, as well as relationships between lawyers. Access to information depends on good relationships, even where there are no

²³ *R v Lodhi* [2006] NSWSC 571 at [62].

technical restrictions on obtaining or publishing the information. Court staff and lawyers are busy, and lawyers will almost always exercise an innate caution that ensures as little information about their client as possible is made public, especially if they are uncertain how information will be used. Even journalists with good contacts found terrorism cases “tougher than routine”.

A tension between lawyers has become apparent, observed even by the courts:

Something of a hostile attitude has emerged between the Commonwealth and the respondents. The respondents consider that the Commonwealth overstates its position on national security matters. The Commonwealth suspects that the respondents do not have a sufficient regard for matters of national security.²⁴

The relationships between lawyers have become very important as each side wants to ensure the other is aware of and comfortable with any media contact:

there’s a lot of sensitivity about making sure everyone’s informed. ... Normally [you] don’t have to have a lot of argument about it when you are asking basic questions. But [in terrorism cases] everyone’s gone very sensitive about it and making sure that they are seen to be doing the right thing. ... There’s a heightened awareness of making sure it’s all done the right and proper and official way.

The problem is accentuated when prosecuting lawyers are from the Commonwealth Department of Public Prosecutions and (unlike their state counterparts) rarely have established relationships with regular reporters in the criminal courts. It is perhaps unsurprising then that lawyers are reluctant to speak. One journalist gave the example of a prosecution lawyer who:

wouldn’t even give me the first name of [the] barrister, saying that [s/he’s] not allowed to talk to the media, and when I explained that “I’m not looking for comment—I’m just trying to get the spelling right”, [s/he] said, “You’re lucky I’m even talking to you.”

Is open justice in terrorism trials in danger of disappearing? The overwhelming impression from the interviews is that this is indeed a genuine concern. One lawyer said that, “The routine order being sought is ... that all security sensitive information be heard in closed court. That is now the default set of orders.” The substance and operation of the laws gave rise to the perception that whereas suppression is “not meant to be the norm” and a case must be made for matters to be suppressed, “the terror rules almost make a different assumption—you’ve almost got to say why it is we *should* be allowed to publish. It almost reverses the onus.”

²⁴ *R v Khazaal* [2006] NSWSC 1353 at [121].

Restrictions, Uncertainty and the Question of Self-Censorship

The effects on reporting criminal proceedings are relatively straightforward because the operation of the laws can be seen with some clarity. In the realm of investigative reporting, the impact of the laws is less certain.

Investigative reporting on terrorism and national security is governed by a range of old and new laws. Defamation will be a concern just as it always has been; suggestions of involvement in terrorist activities or other abhorrent behaviour cannot be made unless they can be proved or are reported as part of covering court proceedings. However, there is much to suggest that new counter-terrorism laws are a significant component of a political and legal environment in which there is a danger of limited access to information and increased caution. This may further diminish the public's ability to know about and engage in informed debate about national security issues.

COUNTER-TERRORISM LAWS AND INVESTIGATIVE REPORTING

The laws with most potential to affect the media are those governing the secrecy of some questioning and detention, and those under which journalists can be questioned and required to produce documents that will identify sources.

First, stringent secrecy provisions limit the media's ability to obtain and disseminate information about the investigation of terrorism. The Australian Security Intelligence Organisation (ASIO) has been granted the power to question and detain people for the purposes of investigation.²⁵ Through the Minister, a warrant may be sought on the basis that

there are reasonable grounds for believing that issuing [it] will substantially assist the collection of intelligence that is important in relation to a terrorism offence ... [and] that relying on other methods of collecting that intelligence would be ineffective.²⁶

A warrant can be issued by a magistrate or judge and requires a person to "give information, or produce records or things, that is/are or may be relevant to intelligence that is important in relation to a terrorism offence".²⁷

Any person who discloses the existence of a warrant while it is in force will be liable to two years imprisonment.²⁸ In the two years after the warrant expires, it will be an offence punishable by five years imprisonment to disclose any "operational information" that is known by virtue of the issue of

²⁵ *Australian Security Intelligence Organisation Act 1979* (Cth) ('the ASIO Act'); *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth); *ASIO Legislation Amendment (Terrorism) Act 2006* (Cth).

²⁶ *ASIO Act* ss 34D(4), 34F(4).

²⁷ *ASIO Act* s 34E(4), 34G(7).

²⁸ *ASIO Act* s 34ZS(1).

the warrant or questioning under it.²⁹ “Operational information” is defined as including an “operational capability, method or plan”.³⁰ This means that the two year post-expiry secrecy is quite comprehensive. Disclosing the existence of the warrant would appear to breach the law because using warrants to obtain intelligence seems to be an operational method. In addition, it would seem almost impossible to disclose any information acquired because, even though the prohibition applies only to operational information, the nature of intelligence work makes it impossible to know whether something is or is not “operational information”.

There are also preventative detention powers under the Commonwealth *Criminal Code*. These enable a person to “be taken into custody and detained for a short period of time in order to prevent an imminent terrorist act occurring” or to “preserve evidence of, or relating to, a recent terrorist act”.³¹ Again, strict disclosure provisions will limit both access to information and publication. A detainee can only tell the Ombudsman or a lawyer that they have been detained.³² Any person who discloses the existence of the order or reveals that someone is being detained will be liable to five years imprisonment.³³ However, unlike the ASIO provisions that continue for two years after the life of the order, the restrictions here finish when the order expires. As a result, it is almost impossible to obtain information about a preventative detention order while it is in force, even though the public interest in the existence of the order may be very strong. However, the public interest in preventing a terrorist attack is so strong that, at least in circumstances where the attack is imminent, there is good reason to see the *Criminal Code* restrictions as justifiable.

Secondly, new laws reduce the extent to which journalists can keep sources confidential. To obtain reliable information about matters of significant public interest—a task at the heart of the media’s fourth estate role—journalists may on occasion need to assure sources that their identities will be kept confidential. The obligation to maintain confidentiality is a core element of the Code of Ethics for Journalists.³⁴ Although it has only limited legal recognition, this obligation is strongly adhered to by journalists.³⁵ There are two ways that counter-terrorism laws affect the media in this regard.

²⁹ *ASIO Act* s 34ZS(2).

³⁰ *ASIO Act* s 34ZS(5).

³¹ *Criminal Code* s 105.1.

³² *Criminal Code* s 105.36 – 105.37. A family member or employer can be contacted so they know the detainee is safe but “not able to be contacted for the time being”; they may not be told of the detention: s 105.35.

³³ *Criminal Code* s 105.41(2).

³⁴ *Evidence Amendment (Journalists’ Privilege) Act 2007* (Cth); *Evidence Act 1995* (Cth) ss 126A-126F; *Evidence Act 1995* (NSW) ss 126Aff.

³⁵ In the United Kingdom courts have observed that the protection of sources is important and, while noting that journalists’ rights are not absolute in this regard, they have limited the scope of

The first is that when the Australian Federal Police (AFP) has reasonable grounds to believe a person has documents that are relevant to and will assist the investigation of “a serious terrorism offence” then it may issue a “notice to produce” documents.³⁶ Documents must relate to finance, the disposal or acquisition of assets, travel, utilities, telephone calls and accounts, or residence.³⁷ If issued against a journalist, it is likely that documents would directly or indirectly identify sources. The second and more coercive possibility is that ASIO can seek a questioning warrant if it believes a journalist may have information that will be useful for the collection of intelligence relating to terrorism offences. The journalist may be unaware that they are in possession of such information and the information need not be admissible in evidence at a criminal trial.

Journalists are not presently able to keep sources confidential without fear of punishment. When there is a case before the courts then a journalist’s failure to identify a source could be contempt of court and could result in imprisonment. For example, where a person is being prosecuted for leaking information to the press, a journalist may be asked to reveal the source of information obtained for a story. Adhering to their Code of Ethics, the journalist will not do so. However, the *ASIO Act* does not require the state to have identified a person who is to be prosecuted and against whom they have compiled a case. These laws enable the security authorities to use a questioning warrant to ask the journalist, “Who is your source?” Remaining silent or refusing to reveal sources will be an offence punishable by five years jail.³⁸ Experience suggests that a contempt penalty would be far less.³⁹

The secrecy provisions associated with the laws are again significant. Failure to comply with a notice to produce attracts a fine up to \$3300,⁴⁰ but where a notice includes terms that prevent the person disclosing the nature or existence of the notice then disclosing its existence a penalty of up to two years imprisonment.⁴¹ The secrecy requirements would make it impossible to gather any support from other journalists, media organisations or anyone else such as a member of parliament in order to contest the demand to reveal a source.

orders to produce documents under the *Terrorism Act 2000*: *Shiv Malik v Manchester Crown Court* [2008] EWHC 1362 [85]-[92], [109]-[111].

³⁶ *Anti-Terrorism Act 2005* (Cth), Schedule 6; *Crimes Act 1914* (Cth) s 3ZQN. The AFP can also request a Federal Magistrate to issue a notice where it concerns “a serious offence”: s 3ZQO.

³⁷ *Crimes Act* s 3ZQP.

³⁸ *ASIO Act* s 34L.

³⁹ See, for example, Senate Standing Committee on Legal and Constitutional Affairs, *Off the Record: Shield Laws for Journalists’ Confidential Sources* (Canberra: AGPS, 1994).

⁴⁰ *Crimes Act* s 3ZQS.

⁴¹ *Crimes Act* ss 3ZQN(3)(g), 3ZQN(4)(g); 3ZQT.

A key issue explored in the interviews was whether journalists and lawyers were concerned that they could be subjected to the coercive powers of the state or prosecuted for a breach of the laws requiring secrecy, and whether any such concerns were affecting the practice of journalism or the editorial decisions to publish. In short, could it be said that the laws have given rise to a chilling effect?

A CHILLING EFFECT?

It is not merely the existence of the laws which matters. Rather, it is a sense of whether and how the laws will be applied which will inform journalistic and editorial decision-making.

Interviewees did not see the main coercive powers as a direct concern. It was largely thought that it was unlikely that journalists would be held in preventative detention. Similarly, it was thought that ASIO questioning powers were unlikely to be used against journalists. However, it troubled several interviewees that journalists can now more easily be questioned without any need for the authorities to have commenced proceedings against a person thought to be a source: “they can haul us in, they can ask the questions and they can detain us until we [answer them]”. Nothing was said to suggest that this possibility affected journalists’ practices but it was argued that “it only has to come up once in a blue moon and for it to be hanging over people’s heads for it to affect the way they do their jobs”. The possibility that a notice to produce documents could be issued was seen as far more likely and was a cause for some concern and dismay, but few would be surprised if these powers were exercised.

The most contentious issues surrounded matters of great uncertainty: would the authorities commence a prosecution if the media breached a secrecy requirement or published restricted information, even where such a breach was clearly undertaken in the public interest? The interviews revealed a difference of opinion about the ways the law would be applied and showed up a distrust of police and security authorities.

At one end of the spectrum there was complete certainty that a breach would be prosecuted. As a senior journalist put it,

They wouldn’t hesitate ... [They have an attitude of] ‘we want to teach them a lesson, get them to pull their heads in, keep them in line, we want to punish them.’

Or, as another said, “They would take the gloves off.” The certainty of prosecution was seen as being motivated by different things:

[the police] would go gangbusters because they will have been telling the court that this information is secret, vital to national security, people’s lives are in danger, etc. It would almost be necessary for them to go hard.

A media lawyer argued that the use of media interviews as evidence in the Jack Thomas prosecution (for example)

indicates a philosophy on the part of the relevant authorities that they will use whatever tools are available to them to get whatever information they think may be relevant to them even if tangentially relevant.

The fact the counter-terrorism laws provide so many tools was thus seen as a major concern.

Conversely, other interviewees thought it highly unlikely a breach would be prosecuted, especially where there was a strong public interest in publication: “No. Definitely not. Absolutely not”, said one journalist. Others shared a lawyer’s view that “the AFP will be reluctant to take on the media—a particular journalist or newspaper or television station—unless it is absolutely necessary”. The media’s tendency and ability “to bite back really hard” would cause the authorities to balk at prosecuting.

Between these views lay a middle ground of doubt:

In certain circumstances I really think they would [prosecute], but not necessarily. If it was really embarrassing or devastating to electoral prospects. [There would be] political considerations ... and maybe genuine security considerations as well. ... I think they’d weigh all that up. I don’t think there’d be a natural reluctance [to prosecute].

There was uncertainty about just what the threshold would be before the authorities would take action but it was generally thought that “all the indications ... are that it won’t be set that high”.

Uncertainty about the consequences of a breach makes the pre-publication legal question very important: would publication in the particular circumstances actually constitute a breach? Some journalists and all media lawyers said that “one of the trickiest and most difficult areas” relates to reporting what could be considered “operational information”. A “complex” and “opaque” law, it is not easy to apply:

Even if you do have the information somehow then understanding what you might be able to report in a safe way, or what has to be kept secret because of the impact of the secrecy provisions is very delicate and difficult.

The behaviour of police and security authorities does not necessarily make the question easier to answer: “Where information that you think should be kept secret has been provided by ASIO itself or the AFP itself ... what do you do in that circumstance?”

While there is clearly great concern among lawyers and journalists, it cannot yet be said that the vulnerability and uncertainty has given rise to a chilling effect. There were repeated statements from interviewees to the effect that, while aware of and concerned about the laws, journalists are not

being put off by the potential reach of the laws in terms of their approach to investigative work or the cultivation of sources. The resistance to state incursion was seen as strong, at least in the major media outlets where the ethos of the fourth estate is genuinely embraced. In exceptional cases, defiance would be a possibility: “where the journalist is convinced they are in possession of a great story that the public should know about”, both lawyers and journalists generally thought that “an editorial decision could be taken to ignore the exposure under this legislation and in fact publish”. In the general run of stories, there was no indication from journalists that they feel they are being hampered by lawyers or editors. None of the media lawyers thought there had been a chilling effect at this point in time, but there was a clear sense of disquiet and caution amongst them—“a nervousness” about the reach of and potential exposure under counter-terrorism laws—and there was no certainty that the chill will remain in abeyance:

Primarily at the moment it's perception, it's worry, it's uncertainty. ... I wouldn't necessarily put it as high as a chilling effect. ... There's a degree of trepidation I suppose' [on the part of both lawyers and journalists because of the] uncertainty about the laws and how they'll be applied. And that can have a tendency to err on the side of caution, especially when there is stuff that's unclear ... new and untested.

There is not, said another lawyer, a chilling effect but there is “a sense [that when you're] dealing with counter-terrorism laws, of not crossing the line, of not fucking it up”.

Sources and Information: Control at the Periphery of the Legal Framework

Even where experiences were not directly attributable to the existence or application of counter-terrorism legislation, the laws were still seen as an indicator of the state's willingness to restrict the flow of information. They were seen as constituting an important part of the context in which relationships are formed and decisions made. Although the laws were not necessarily being applied, the interviews suggested that counter-terrorism laws and the broader legal framework are nonetheless very much in the minds of sources in the community and the state. As such, the experiences at the periphery of the legal framework are at least as important as those which are affected directly by the laws.

INFORMATION FROM THE COMMUNITY

Journalists reported that Muslim communities tended not to trust the media. The strongest comment was that “the media are seen as proxies for the authorities”. Others tended to think it was a broader sense of marginalisation and distrust of major media organisations which had treated Muslim communities badly. The perception, it was said, is that even if people accepted that the media were not working for the police then it was still thought that some journalists “may look at the police favourably, ... or

their work will be used by the authorities at the end of the day. And there has been a bit of truth in that". Community cautiousness seems justified because it appears the authorities monitor and exploit the way that a person deals with the media. While journalists generally thought their phone calls or emails were not directly monitored, most worked on the basis that their sources' calls would be monitored. There are already instances where journalists' work has been used by the authorities in the prosecution of terrorism offences.⁴² Added to this, argued one journalist, the Australian media is, on the whole, "all a bit Anglo" and does not have the base of community contacts that provide a base for the trust in the media that is needed.

Journalists have found it difficult to get information from families or friends of people charged or under investigation. Families and friends of suspects "go to ground" once a person is arrested. Police, it was said, may warn families not to talk to the media in words "along the lines of, 'Well, you know, we've got a lot of power under the new laws.'" As a lawyer put it:

[The journalist] is right. They *do* have a lot of powers. [Families of suspects] are warned by their lawyers not to talk to the media because if they go and say to a television camera, "My brother is a good man and I stand by him", then they run the risk of being prosecuted for supporting terrorism.⁴³

Specificity is not required to make a point: "You know we've got these new laws, and you know how strict [they] are. If you don't [do as we say then] we'll consider our options."

Silence has a significant affect on what the public gets to know. When someone will not speak to the media then a journalist's inquiries and analysis will take account of that. If it is not clear why a person refuses to speak then that may lead to adverse judgments:

⁴² The best known in Australia concerns the prosecution of Jack Thomas. After he was acquitted of some terrorism charges, the ABC broadcast interviews they had conducted with him before the trial took place. These interviews became the basis on which a re-trial was successfully sought: *R v Thomas (No 4)* [2008] VSCA 107; S. Neighbour, 'The Convert', *Four Corners*, ABC Television, 27 February 2006, <<http://www.abc.net.au/4corners/content/2006/s1580223.htm>> [Accessed 10 May 2009]; Mark Pearson and Naomi Busst, 'Anti-Terror Laws and the Media after 9/11: Three Models in Australia, New Zealand and the Pacific', *Pacific Journalism Review*, vol. 12, no. 2 (2006), pp. 9-27. In the United Kingdom, see *Shiv Malik v Manchester Crown Court* [2008] EWHC 1362.

⁴³ The possibility of prosecution may be somewhat alleviated following the Australian government's response to recommendations following reviews of terrorism legislation, though a warning given in unspecific terms may nonetheless make people reluctant to speak. See 'Australian Government responses to the Clarke Inquiry and other counter-terrorism reviews', 23 December 2008, <http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsestotheClarkeInquiryandothercounter-terrorismreviews-December2008> [Accessed 19 February 2009].

if you ask a question and they don't answer, you might form a different judgment about why they aren't speaking, whether they've got something to hide. It has an impact on the story.

One journalist with significant contacts in Muslim and Arab communities argued that there was a more widespread silencing of opinion, stretching from individual interviews through to general discussion and talkback radio:

I think people were forthcoming before, they were much more vocal. ... I think that people have become much more paranoid now [and] they're not speaking. ... There's a self-censorship.

This, it was said is a cause for concern: "we don't know what their thoughts are because they're not talking any more".

INFORMATION FROM THE STATE

The steadiest stream of information about terrorism comes from the government and its agencies, especially the police. Formal press statements, informal background briefing, and contacts within organisations are all important sources of information. Journalists and lawyers identified problems that affected their ability to get reliable information and, especially, information that can be tested across different sources.

Every journalist interviewed believed that access to information from sources in police and government has become more limited. This was partly, it was thought, because high levels of secrecy surrounding terrorism matters meant that fewer people in government have access to information. However, of much greater concern was that view that institutional sources are very vulnerable to prosecution:

I think [people are] very conscious [of what they are saying and leaking]. I get that broad picture stuff from contacts but people are pretty wary of giving you specific information. ... I think here there is a culture of fear—people see cases like Allan Kessing and that—fear for their own jobs.

Kessing was a public servant in the Customs department who in 2003 wrote an internal report on security problems at Sydney Airport. After being 'buried' for more than two years, the report was leaked to a national newspaper in 2005 with the result that the government spent over \$200 million improving airport security. Kessing has always denied he leaked the report but was charged with doing so. In 2007 he was found guilty and received a nine-month suspended prison sentence.⁴⁴ Described as an example of the "ruthless pursuit of whistleblowers and anyone else who contributes to the disclosure of government information", the Kessing matter was referred to often. Journalists and lawyers alike had little doubt that where information adverse to the government was leaked then the leaker

⁴⁴ See generally, 'Strictly Confidential: Information, Secrecy and Government', *Insight*, SBS Television, 25 September 2007 (transcript available on request from <www.sbs.com.au/insight/archive>).

would be aggressively pursued. This was contrasted to occasions where it seemed that sensitive or secret information was strategically disclosed to the media; in almost every interview there was a mention of the presence of television cameras (from one organisation only) at a raid by the AFP.⁴⁵

The second major observation concerned the ways that police managed information. As well as attempts to minimise media access to trials and court hearings, there was a perception amongst interviewees that the phrase “operational information” was deliberately employed to enable the government and the police to selectively disclose or withhold information. It was accepted that sometimes these are necessary steps for the authorities to take but there was much cynicism and a view that, too often, the intention was to restrict or manipulate media coverage rather than provide information which would enable a full and fair account in the press. The perceived strategic use of press conferences was heavily criticised. Lawyers were especially critical of police or ministerial statements made between the time a person was arrested and charged, and the time—which is often just hours—the person came before a court to apply for bail. Mohamed Haneef’s barrister, Stephen Keim, has argued that his client was:

subjected to an unrelenting campaign to damage his prospects before any future jury. From the moment of his arrest, law enforcement sources campaigned, albeit anonymously, to destroy his reputation in the community even though they must have been aware that their leaks were, variously, either misleading or simply untrue.⁴⁶

Generally, the police and government approach to the media was seen as “calculated” and it was thought “there is a real, real concern” that there are “layers of spin doctors” involved in the provision of information. A journalist observed that in one matter, “the authorities knew what they had and didn’t have, but didn’t move to correct anything they saw was obviously wrong”. Accordingly, there is great caution about relying on information provided by the police.

⁴⁵ This was the subject of complaint and an investigation which found that ASIO had not authorised any communication with the media by its own officers or those of police agencies, and that there had been no unauthorised disclosure from within ASIO: *Annual Report of the Inspector General of Intelligence and Security 2005-06* (Canberra: Commonwealth of Australia, 2006), pp. 23-4; cf. George Negus, ‘Rob Stary Interview’, *Dateline*, SBS Television, 29 June 2005, <http://news.sbs.com.au/dateline/rob_stary_interview_130535> [Accessed 10 September 2008]; T. Cookes, ‘ASIO Leaks’, *Dateline*, SBS Television, 3 August 2005, <http://news.sbs.com.au/dateline/asio_leaks_130554> [Accessed 10 September 2008].

⁴⁶ S. Keim, ‘Dr Haneef and Me’, *Alternative Law Journal*, vol. 33, no. 2 (2008), pp. 99-102 at 100 (references omitted). Similar criticisms have been made by criminal lawyer Rob Stary: Cookes, ‘ASIO Leaks’.

SCEPTICISM, DISTRUST AND SECURITY

Police and security agencies face immense difficulties in assessing and addressing security threats and clearly do not want to be seen to fail in these tasks. Journalists and lawyers acknowledged this and saw a direct link between the difficulties and the tendency towards secrecy:

The authorities are very, very wary of being caught short. Not doing enough. ... Take Haneef, he's on his way to the airport, etc ... I think they take that very seriously and there are reasons for that. There is a whole err on the side of caution and [because of that] there is a tendency to keep information secret.

The media criticisms of the state did not, then, turn on the issue of secrecy of itself. Rather, the criticism centred around arguments that the government, police and security authorities have misjudged or responded poorly to security issues in circumstances that suggest secrecy has been either unnecessary or unjustified. The Haneef case was uppermost in the minds of all interviewees given the timing of the interviews, and comments suggest it has done inestimable damage to the trust the media have in the state. It was repeatedly cited as an example of the mismanagement of a prosecution and manipulation of information by government and police.⁴⁷ One of the more moderate comments was that it

increase[s] the realm of scepticism when you see that kind of crying wolf going on, so you don't tend to side ... with government claims about the need for all this stuff.

The Report of the Clarke Inquiry is unlikely to settle these doubts: the criticism that documents were "over-classified" in terms of secrecy, the criticism of the Immigration Minister and Department, and the AFP submission that there should be a formal restriction on the release of interview material will not put minds at ease.⁴⁸

But the scepticism was not limited to Haneef. A media lawyer's experience was that there is "a real culture of secrecy" in the offices of the Commonwealth Attorney-General's and Director of Public Prosecutions that goes "way beyond" what is necessary. Journalists echoed this, reporting an "environment of secrecy" in which officials conveyed the sense that "secret information is held which indicates that there is something more than what you have been told". When information is released the view was that

⁴⁷ For example, Chris Merritt states that the AFP handling of the matter makes the organisation look "sly": 'Cynical attempt to fool media', *The Australian*, 30 August 2008. It might be argued that the damage to trust is influenced by, and should be viewed in light of, broader events in the past decade; see generally Clive Hamilton and Sarah Maddison (eds.), *Silencing Dissent* (Sydney: Allen & Unwin, 2007); David Marr, *His Master's Voice: The Corruption of Public Debate under Howard* (Quarterly Essay N.o 26) (Melbourne: Black Inc, 2007).

⁴⁸ *Report of the Clarke Inquiry*, pp. 5, 160-161, 195-199, 285-286; see also Andrew Lynch, 'Learning from Haneef', *Inside Story*, 5 February 2009, <<http://inside.org.au/learning-from-haneef/>> [Accessed 19 February 2009].

they have an agenda for making it available. In most of this stuff I just tend to find every bit that comes out, they're dragged kicking and screaming to let it come out.

Another cautioned that the problem when information is released is that not only does it have an agenda, but “you don't know what you're getting—you don't know what agenda's being run”. The tendency to secrecy is damaging because “when things become so secretive and nebulous then reporters—not all, but some—conjure up fictions”. Journalists become vulnerable to off the record briefings, especially by police; if that is the only information that can be obtained and it is difficult to test then that is the information most likely to be published. But when the authorities are shown to have been secretive and to have been wrong then it will inevitably—and rightly—result in a resounding attack on the state.

Conclusion

The enactment of counter-terrorism laws has been a response driven by security needs. The pursuit of security has seen a significant impact on the ability of the media to obtain information and convey it to the public. In large part, the potential effects of the laws remain far greater than the actual effects. However, although the resilience and robustness of the media persists for the time being, it does not mean that this situation will continue.

The relationship between security and media freedom in this context is not a straightforward one. While law can be vitally important—as the NSI legislation makes clear—the effects on media freedom do not directly correlate with restrictions (or freedoms) that are embodied in legislation. In particular, as the analysis above indicates, information is controlled in ways that are not dependent on the law being applied in a coercive or punitive way. The legislative framework can be seen as an indicator of priorities and approaches to information; it is a contextual beacon that signals and reflects the push for constant caution and secrecy. Indeed, at the periphery of the legal framework—where there are few provisions with direct effect—there appears to be a sweeping attempt to control of information. This sits in contrast with the ways that formal legal mechanisms have not yet had a chilling effect.

Information is controlled not merely by the authority of law, but by interwoven bonds of secrecy and trust. To the extent that control over information is necessary for national security, then these bonds are essential. However, there is much to suggest they are in danger of being loosened. It might be fairly said that the media will not be trusted by the state unless it can prove itself to have standards and practices that warrant that trust, but it is not a crisis of trust in the media that has given rise to concerns; it is a diminution of trust in the state that is troubling. The Haneef matter is emblematic of the dangers and problems but, as the interviews with media professionals indicate, closure and control and of information is pervasive. This is deeply

troubling; when events cast doubt upon the proposition that those who keep things secret can be trusted, then it is not merely the balance of security and media freedom which rests precariously, but security itself.

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